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No. 87-201

In The

Supreme Court of the United States

October Term, 1988

GERALD E. MANSELL,

Appellant,

v.

GAYE M. MANSELL

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA FIFTH APPELLATE DISTRICT

RESPONSE, AND DOCUMENTS IN SUPPORT OF RESPONSE, TO THE MOTION OF UNITED STATES FOR LEAVE TO FILE AS AMICUS CURIAE

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Gaye M. Mansell, Appellee herein, objects to the motion filed by the Solicitor General, on behalf of the Government, and respectfully requests this Court deny the motion.

The position of the Government in this matter is a direct result of a lack of due diligence on the part of the Government. Appellee has had no part in the decision making process of the Government, and has not in any way impeded the Government in their actions. The Appellee is now the one being directly punished as the

result of the lack of due diligence by the Government. The lackadaisical approach taken by the Government in this action should not be condoned by allowing them to file their brief more than forty-five days after the date it was due, and also after the briefs in response have been filed by the Appellee and the Amicus Curiae for the Appellee.

The Government was asked to file a brief as amicus curiae in this matter on December 7, 1987, and did file such a brief on June 7, 1988. This Court noted probable jurisdiction in this matter on June 27, 1988, making Appellant's brief due August 11, 1988. An extension was granted Appellant to file his brief until August 25, 1988.

On September 6, 1988, two weeks after the deadline for filing all briefs on behalf of the Appellant, the Government indicated they were intending to file an additional brief in support of the position of the Appellee and requested the Appellee seek an extension of time to assist in the filing of that brief by the Government. On September 7, 1988, the Government filed its motion with this Court for divided argument. On September 9, 1988, the Appellee requested the time for the filing of the brief on the merits be extended to October 8, 1988, which was granted by this Court on September 14, 1988.

On September 26, 1988, the Government indicated to this Court they wanted to defer action on the motion for divided argument pending further consideration. A copy of that request was received by Appellee on September 30, 1988.

On September 28, 1988, Appellee contacted the Government, after having received no contact from the Government for several weeks, and was informed the Government was reviewing its position and might change its position. Further contact from Mr. Thomas Merrill, Deputy Solicitor General, indicated an additional extension of time within which to file the briefs would receive favorable treatment by the Clerk of the Court, making the expensive and time consuming filing of a supplemental brief unnecessary.

As indicated in the supporting documents, the brief for Appellee had to be off to the printers by the 30th of September in order to have sufficient time to make all corrections necessary before the final brief was filed by October 8th.

After discussing the matter with the Assistant Clerk of this Court, it was determined the only grounds for seeking an additional extension would be the brief reportedly being filed by the Government, and that no other grounds existed, nor would any other grounds be fabricated.

Indications from the Assistant Clerk were that the filing of the brief by the Government in which they changed their position may or may not be relied upon as sufficient grounds for an extension. Based on such information, the Appellee filed her brief on the merits on October 6, 1988.

On October 4, 1988, the Government indicated their motion for divided argument should be withdrawn from the Court's calendar, and such communication was received by Appellee on October 6, 1988. The motion to

which this response is being filed was received on October 11, 1988.

Based upon the foregoing series of events, it can be seen the Appellee has been greatly prejudiced. The Government had more than ample time to review the situation, and review the appropriate position it wished to take in this matter. *The Government's decision to change position was not communicated until after Appellee contacted the Government.* One can only wonder when, if ever, the Government intended to inform Appellee.

The decision was made so late in the briefing process, Appellee had no choice but to file her brief on the merits. By thus filing, the Appellee is now faced with the prospect of seeking the permission of this Court to file a supplemental brief in response to any points raised by the Government. Further, the Amicus Curiae that filed in support of the position of the Appellee is now prevented from commenting on the brief of the Government even though the rules of this Court anticipate allowing such amicus curiae to so comment. It is questionable if the limited funds of the Amici would permit filing such a brief.

The Solicitor General states in his motion the Government will present new materials not cited by any other party. This rationale is, under the circumstances, dubious at best. Between all the cases, reports, hearing transcripts, law review articles, and the like, a small library could be cited were it not for page limitations. There is no doubt Appellee could write a supplemental brief citing materials not cited by any other party to date, including the Government.

Appellee has now been placed in the position of expending more time, and expense, in responding to the position of the Government when such position, had the Government acted with due diligence, should have been known within the time limits allowed to the Appellant in this matter.

CONCLUSION

For the foregoing reasons, and the further reasons set forth in the Declaration of Dennis A. Cornell, and the Declaration of Cathryn A. Lamb, the motion of the United States to file as amicus curiae should be denied by this Court.

Respectfully submitted,

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APPENDIX

Declaration of Dennis A. Cornell, Counsel for Appellee

I, Dennis A. Cornell, declare:

1. I am the attorney for the Appellee, Gaye M. Mansell.

2. On December 7, 1987, this Court requested the Government file a brief as amicus curiae in this matter.

3. On June 7, 1987, the Government filed its brief with this Court indicating the position of the Appellee should prevail, but that probable jurisdiction should be noted to resolve the question once and for all.

4. On June 27, 1987, this Court noted probable jurisdiction.

5. On August 25, 1988, the time within which the Appellant's brief on the merits should be filed, and all briefs of amicus curiae in support should be filed, expired.

6. On September 6, 1988, Christine Desan Husson, Assistant to the Solicitor General, contacted your declarant, and indicated the Government wished to file an additional brief on the merits in support of the position of the Appellee, and further requested Appellee seek an extension of time so the Government could file such a brief.

7. On September 7, 1988, the Government filed its motion with this Court for divided argument which motion reflected the agreement of Appellee to assign a portion of time for her argument to the Government.

8. On September 9, 1988, Appellee sought an extension of time due to calendaring conflicts resulting from the original extension having been granted to Appellant.

9. On September 14, 1988, this Court granted an extension until October 8, for Appellee to file her brief on the merits.

10. On September 28, 1988, *your declarant contacted Ms. Desan Husson by phone to determine the progress of the brief as your declarant had not had any contact with the Government since the conversation of September 6th.* At that time, Ms. Desan Husson indicated the Government was more than likely going to change their position on the matter and was going to support the position of the Appellant. Ms. Desan Husson further indicated the Government would assist with the Clerk's Office to obtain another extension of time so Appellee's brief on the merits could address the brief being filed by the Government.

11. Your declarant informed Ms. Desan Husson in the conversation of September 28, 1988, the time requirements of the printer required the brief on the merits of the Appellee be sent to the printer on September 29, 1988 in order for the brief to be filed within the time required by this Court. Ms. Desan Husson indicated her superior would be in contact with the Court and would make it easier for Appellee to obtain an extension so the time requirements would not be so severe.

12. Later in the day on September 28, 1988, Tom Merrill, Deputy Solicitor General, contacted your declarant and indicated he had discussed the matter with the Clerk's Office of the Supreme Court and had received an

indication Appellee could obtain an extension as a result in the change of position being taken by the Government. Mr. Merrill further indicated a final decision by the Government as to whether or not the Government was going to change its position had not yet been made, but that your declarant would be informed as soon as such a decision was made.

13. An additional discussion was had with Mr. Merrill on September 29, 1988, in which Mr. Merrill indicated your declarant should contact Sandy Nelson, the Assistant Clerk of this Court, to determine whether or not an extension could be obtained in order to respond to the change in position which most probably would be taken by the Government. Mr. Merrill further asked if your declarant could wait until later in the following week to send the brief to the printer if an extension were not granted.

14. As it was too late in the day on the 29th to contact this Court, and as your declarant was in trial in another county on September 30th, Cathryn A. Lamb, legal assistant to your declarant, contacted Ms. Nelson at the Court on September 30, 1988. The result of that conversation is contained in her declaration which is included with this response.

15. Apparently, on September 26, 1988, two days prior to your declarant's initiating contact with the Government, the Government filed a request with this Court that its motion for divided argument be deferred pending further consideration. A copy of that request was received by Appellee on September 30, 1988.

16. After the discussions with Ms. Desan Husson and Mr. Merrill, and wanting to discuss the situation with Ms. Nelson, contact was made with the printer to determine the latest possible time the brief could be submitted without incurring significant overtime costs. Based on the representations of the printer, a delay of four days, from September 29th to October 3rd, was scheduled.

17. On September 30, 1988, based on the conversation of Cathryn A. Lamb with Ms. Nelson, and based on the extremely tight printing schedule previously established with the printer, it was decided the brief on the merits of the Appellee should be filed as scheduled and it was sent to the printer on the morning of October 3, 1988.

18. On October 6, 1988, the brief was filed with this Court by Appellee. Also on that date, Mr. Merrill contacted your declarant and indicated the Government had decided to take a new position in the matter and was seeking the permission of this Court to file a brief in support of the Appellant, and that a copy of such motion should have been received by Appellee.

19. On October 7, 1988, a rough draft was received by Appellee, and the actual motion itself was received on October 11, 1988.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Merced, California on October 12, 1988.

Dennis A. Cornell,
Attorney for Appellee

Declaration of Cathryn A. Lamb, Legal Assistant to Dennis A. Cornell, Attorney for Appellee

I, Cathryn A. Lamb, declare:

1. I am employed as a legal assistant to Dennis A. Cornell, Attorney for Appellee.

2. On The afternoon of September 29, 1988, Mr. Cornell informed me he would be in trial, out of town, the next day and requested I contact Sandy Nelson at the Clerk's Office of the U.S. Supreme Court regarding a possible extension of time in which to file the Appellee's brief on the merits.

3. On the morning of September 30, 1988, I telephoned Ms. Nelson, and stated to her the Solicitor General's office indicated we could get an extension due to the change in their position. I did not receive an assurance from Ms. Nelson that an extension would be granted for that reason, but rather Mr. Cornell would have to send a written request. We discussed the time it would take to file such a request, and I was informed by Ms. Nelson that a decision would be made after receipt of the request and, appropriately, no guarantee or assurance could be granted over the phone.

4. I informed Mr. Cornell of the conversation in the early evening of September 30, 1988, when he telephoned his office.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Merced, California on October 12, 1988.

Cathryn A. Lamb,
Legal Assistant to
Dennis A. Cornell